

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF APPELLATE PROCEDURE<sup>1</sup>**

1 **Rule 32. Form of Briefs, Appendices, and Other**  
2 **Papers**

3 \* \* \* \* \*

4 **(g) Certificate of Compliance.**

5 (1) **Briefs and Papers That Require a**  
6 **Certificate.** A brief submitted under Rules  
7 28.1(e)(2), 29(b)(4), or 32(a)(7)(B)—and a  
8 paper submitted under Rules 5(c)(1),  
9 21(d)(1), 27(d)(2)(A), 27(d)(2)(C),  
10 ~~35(b)(2)(A)~~; or ~~40(b)(1)~~ 40(d)(3)(A)—must  
11 include a certificate by the attorney, or an  
12 unrepresented party, that the document  
13 complies with the type-volume limitation.  
14 The person preparing the certificate may rely

---

<sup>1</sup> New material is underlined in red; matter to be omitted is lined through.

15 on the word or line count of the word-  
16 processing system used to prepare the  
17 document. The certificate must state the  
18 number of words—or the number of lines of  
19 monospaced type—in the document.

20 (2) **Acceptable Form.** Form 6 in the Appendix  
21 of Forms meets the requirements for a  
22 certificate of compliance.

**Committee Note**

Changes to subdivision (g) reflect the consolidation of Rules 35 and 40.

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF APPELLATE PROCEDURE<sup>1</sup>**

- 1 **Rule 35. ~~En Banc Determination~~**  
2 **(Transferred to Rule 40)**
- 3 ~~(a) — When Hearing or Rehearing En Banc May Be~~  
4 **Ordered.** A majority of the circuit judges who are in  
5 regular active service and who are not disqualified  
6 may order that an appeal or other proceeding be  
7 heard or reheard by the court of appeals en banc. An  
8 en banc hearing or rehearing is not favored and  
9 ordinarily will not be ordered unless:
- 10 ~~(1) — en banc consideration is necessary to~~  
11 secure or maintain uniformity of the  
12 court’s decisions; or
- 13 ~~(2) — the proceeding involves a question of~~  
14 exceptional importance.

---

<sup>1</sup> New material is underlined in red; matter to be omitted is lined through.

15 ~~(b) — Petition for Hearing or Rehearing En~~

16 ~~Banc.~~ A party may petition for a hearing or

17 rehearing en banc.

18 ~~(1) — The petition must begin with a~~

19 ~~statement that either:~~

20 ~~(A) — the panel decision conflicts~~

21 ~~with a decision of the United~~

22 ~~States Supreme Court or of~~

23 ~~the court to which the petition~~

24 ~~is addressed (with citation to~~

25 ~~the conflicting case or cases)~~

26 ~~and consideration by the full~~

27 ~~court is therefore necessary to~~

28 ~~secure — and — maintain~~

29 ~~uniformity of the court's~~

30 ~~decisions; or~~

31 ~~(B) — the proceeding involves one~~

32 ~~or more questions of~~

33 ~~exceptional importance, each~~  
34 ~~of which must be concisely~~  
35 ~~stated; for example, a petition~~  
36 ~~may assert that a proceeding~~  
37 ~~presents a question of~~  
38 ~~exceptional importance if it~~  
39 ~~involves an issue on which the~~  
40 ~~panel decision conflicts with~~  
41 ~~the authoritative decisions of~~  
42 ~~other United States Courts of~~  
43 ~~Appeals that have addressed~~  
44 ~~the issue.~~

45 ~~(2) Except by the court's permission:~~

46 ~~(A) a petition for an en banc~~  
47 ~~hearing or rehearing produced~~  
48 ~~using a computer must not~~  
49 ~~exceed 3,900 words; and~~

50                   ~~(B) a handwritten or typewritten~~  
51                   ~~petition for an en banc hearing~~  
52                   ~~or rehearing must not exceed~~  
53                   ~~15 pages.~~

54           ~~(3) For purposes of the limits in Rule~~  
55           ~~35(b)(2), if a party files both a~~  
56           ~~petition for panel rehearing and a~~  
57           ~~petition for rehearing en banc, they~~  
58           ~~are considered a single document~~  
59           ~~even if they are filed separately,~~  
60           ~~unless separate filing is required by~~  
61           ~~local rule.~~

62   ~~(c) **Time for Petition for Hearing or**~~  
63           ~~**Rehearing En Banc.** A petition that an~~  
64           ~~appeal be heard initially en banc must be filed~~  
65           ~~by the date when the appellee's brief is due.~~  
66           ~~A petition for a rehearing en banc must be~~

67           ~~filed within the time prescribed by Rule 40~~  
68           ~~for filing a petition for rehearing.~~

69   **~~(d) — Number of Copies.~~** ~~The number of copies to~~  
70           ~~be filed must be prescribed by local rule and~~  
71           ~~may be altered by order in a particular case.~~

72   **~~(e) — Response.~~** ~~No response may be filed to a~~  
73           ~~petition for an en banc consideration unless~~  
74           ~~the court orders a response. The length limits~~  
75           ~~in Rule 35(b)(2) apply to a response.~~

76   **~~(f) — Call for a Vote.~~** ~~A vote need not be taken to~~  
77           ~~determine whether the case will be heard or~~  
78           ~~reheard en banc unless a judge calls for a~~  
79           ~~vote.~~

#### Committee Note

For the convenience of parties and counsel, the amendment addresses panel rehearing and rehearing en banc together in a single rule, consolidating what had been separate, overlapping, and duplicative provisions of Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 are transferred to

Rule 40, which is expanded to address both panel rehearing and en banc determination.

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF APPELLATE PROCEDURE<sup>1</sup>**

- 1 **Rule 40. ~~Petition for Panel Rehearing; En Banc~~**  
2 **Determination**
- 3 (a) ~~Time to File; Contents; Response; Action by the~~  
4 ~~Court if Granted.~~ **A Party's Options.** A party may  
5 seek rehearing of a decision through a petition for  
6 panel rehearing, a petition for rehearing en banc, or  
7 both. Unless a local rule provides otherwise, a party  
8 seeking both forms of rehearing must file the  
9 petitions as a single document. Panel rehearing is the  
10 ordinary means of reconsidering a panel decision;  
11 rehearing en banc is not favored.
- 12 ~~(1) **Time.** Unless the time is shortened or~~  
13 ~~extended by order or local rule, a petition for~~  
14 ~~panel rehearing may be filed within 14 days~~

---

<sup>1</sup> New material is underlined in red; matter to be omitted is lined through.

15 ~~after entry of judgment. But in a civil case,~~  
16 ~~unless an order shortens or extends the time,~~  
17 ~~the petition may be filed by any party within~~  
18 ~~45 days after entry of judgment if one of the~~  
19 ~~parties is:~~

20 ~~(A) the United States;~~  
21 ~~(B) a United States agency;~~  
22 ~~(C) a United States officer or employee~~  
23 ~~sued in an official capacity; or~~

24 ~~(D) a current or former United States~~  
25 ~~officer or employee sued in an~~  
26 ~~individual capacity for an act or~~  
27 ~~omission occurring in connection~~  
28 ~~with duties performed on the United~~  
29 ~~States' behalf including all~~  
30 ~~instances in which the United States~~  
31 ~~represents that person when the court~~



- 49                   (A) ~~make a final disposition of the case~~  
50                                   ~~without reargument;~~
- 51                   (B) ~~restore the case to the calendar for~~  
52                                   ~~reargument or resubmission; or~~
- 53                   (C) ~~issue any other appropriate order.~~

54   **(b) ~~Form of Petition; Length.~~ Content of a Petition.**

55   ~~The petition must comply in form with Rule 32.~~  
56   ~~Copies must be served and filed as Rule 31~~  
57   ~~prescribes. Except by the court's permission:~~

- 58   (1) ~~a petition for panel rehearing produced using~~  
59                   ~~a computer must not exceed 3,900 words; and~~

60                   **Petition for Panel Rehearing. A petition for**  
61                   **panel rehearing must:**

- 62                   (A) state with particularity each point of  
63                                   law or fact that the petitioner believes  
64                                   the court has overlooked or  
65                                   misapprehended; and

- 66                   (B) argue in support of the petition.



85 United States court of appeals (with  
86 citation to the conflicting case or  
87 cases); or

88 (D) the proceeding involves one or more  
89 questions of exceptional importance,  
90 each concisely stated.

91 **(c) When Rehearing En Banc May Be Ordered. On**  
92 their own or in response to a party's petition, a  
93 majority of the circuit judges who are in regular  
94 active service and who are not disqualified may order  
95 that an appeal or other proceeding be reheard en  
96 banc. Unless a judge calls for a vote, a vote need not  
97 be taken to determine whether the case will be so  
98 reheard. Rehearing en banc is not favored and  
99 ordinarily will be allowed only if one of the criteria  
100 in Rule 40(b)(2)(A)-(D) is met.

101 **(d) Time to File; Form; Length; Response; Oral**  
102 **Argument.**

103           (1) **Time.** Unless the time is shortened or  
104                   extended by order or local rule, any  
105                   petition for panel rehearing or  
106                   rehearing en banc must be filed  
107                   within 14 days after judgment is  
108                   entered—or, if the panel later amends  
109                   its decision (on rehearing or  
110                   otherwise), within 14 days after the  
111                   amended decision is entered. But in a  
112                   civil case, unless an order shortens or  
113                   extends the time, the petition may be  
114                   filed by any party within 45 days after  
115                   entry of judgment or of an amended  
116                   decision if one of the parties is:  
117                   (A) the United States;  
118                   (B) a United States agency;

119 (C) a United States officer or  
120 employee sued in an official  
121 capacity; or

122 (D) a current or former United  
123 States officer or employee  
124 sued in an individual capacity  
125 for an act or omission  
126 occurring in connection with  
127 duties performed on the  
128 United States' behalf—  
129 including all instances in  
130 which the United States  
131 represents that person when  
132 the court of appeals' judgment  
133 is entered or files that person's  
134 petition.

135 (2) **Form of the Petition.** The petition  
136 must comply in form with Rule 32.

137 Copies must be filed and served as  
138 Rule 31 prescribes, except that the  
139 number of filed copies may be  
140 prescribed by local rule or altered by  
141 order in a particular case.

142 (3) **Length.** Unless the court or a local  
143 rule allows otherwise, the petition (or  
144 a single document containing a  
145 petition for panel rehearing and a  
146 petition for rehearing en banc) must  
147 not exceed:

148 (A) 3,900 words if produced using  
149 a computer; or

150 (B) 15 pages if handwritten or  
151 typewritten.

152 (4) **Response.** Unless the court so  
153 requests, no response to the petition is  
154 permitted. Ordinarily, the petition

155 will not be granted without such a  
156 request. If a response is requested, the  
157 requirements of Rule 40(d)(2)-(3)  
158 apply to the response.

159 (5) **Oral Argument.** Oral argument on  
160 whether to grant the petition is not  
161 permitted.

162 (e) **If a Petition is Granted.** If a petition for  
163 panel rehearing or rehearing en banc is  
164 granted, the court may:

165 (1) dispose of the case without further  
166 briefing or argument;

167 (2) order additional briefing or argument;  
168 or

169 (3) issue any other appropriate order.

170 (f) **Panel's Authority After a Petition for**  
171 **Rehearing En Banc.** The filing of a petition  
172 for rehearing en banc does not limit the

173 panel’s authority to take action described in  
174 Rule 40(e).  
175 **(g) Initial Hearing En Banc.** On its own or in  
176 response to a party’s petition, a court may  
177 hear an appeal or other proceeding initially en  
178 banc. A party’s petition must be filed no later  
179 than the date when its principal brief is due.  
180 The provisions of Rule 40(b)(2), (c), and  
181 (d)(2)-(5) apply to an initial hearing en banc.  
182 But initial hearing en banc is not favored and  
183 ordinarily will not be ordered.

#### Committee Note

For the convenience of parties and counsel, the amendment addresses panel rehearing and rehearing en banc together in a single rule, consolidating what had been separate, overlapping, and duplicative provisions of Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 are transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.

**Subdivision (a).** The amendment makes clear that parties may seek panel rehearing, rehearing en banc, or both. It emphasizes that rehearing en banc is not favored and that

rehearing by the panel is the ordinary means of reconsidering a panel decision. This description of panel rehearing is by no means designed to encourage petitions for panel rehearing or to suggest that they should in any way be routine, but merely to stress the extraordinary nature of rehearing en banc. Furthermore, the amendment's discussion of rehearing petitions is not intended to diminish the court's existing power to order rehearing sua sponte, without any petition having been filed. The amendment also preserves a party's ability to seek both forms of rehearing, requiring that both petitions be filed as a single document, but preserving the court's power (previously found in Rule 35(b)(3)) to provide otherwise by local rule.

**Subdivision (b).** Panel rehearing and rehearing en banc are designed to deal with different circumstances. The amendment clarifies the distinction by contrasting the required content of a petition for panel rehearing (preserved from Rule 40(a)(2)) with that of a petition for rehearing en banc (preserved from Rule 35(b)(1)).

**Subdivision (c).** The amendment preserves the existing criteria and voting protocols for ordering rehearing en banc, including that no vote need be taken unless a judge calls for a vote (previously found in Rule 35(a) and (f)).

**Subdivision (d).** The amendment establishes uniform time, form, and length requirements for petitions for panel rehearing and rehearing en banc, as well as uniform provisions for responses to the petition and oral argument.

*Time.* The amended Rule 40(d)(1) preserves the existing time limit, after the initial entry of judgment, for filing a petition for panel rehearing (previously found in Rule 40(a)(1)) or a petition for rehearing en banc (previously found in Rule 35(c)). It adds new language extending the

same time limit to a petition filed after a panel amends its decision, on rehearing or otherwise.

*Form of the Petition.* The amended Rule 40(d)(2) preserves the existing form, service, and filing requirements for a petition for panel rehearing (previously found in Rule 40(b)), and it extends these same requirements to a petition for rehearing en banc. The amended rule also preserves the court's existing power (previously found in Rule 35(d)) to determine the required number of copies of a petition for rehearing en banc by local rule or by order in a particular case, and it extends this power to petitions for panel rehearing.

*Length.* The amended Rule 40(d)(3) preserves the existing length requirements for a petition for panel rehearing (previously found in Rule 40(b)) and for a petition for rehearing en banc (previously found in Rule 35(b)(2)). It also preserves the court's power (previously found in Rule 35(b)(3)) to provide by local rule for other length limits on combined petitions filed as a single document, and it extends this authority to petitions generally.

*Response.* The amended Rule 40(d)(4) preserves the existing requirements for a response to a petition for panel rehearing (previously found in Rule 40(a)(3)) or to a petition for rehearing en banc (previously found in Rule 35(e)). Unsolicited responses to rehearing petitions remain prohibited, and the length and form requirements for petitions and responses remain identical. The amended rule also extends to rehearing en banc the existing statement (previously found in Rule 40(a)(3)) that a petition for panel rehearing will ordinarily not be granted without a request for a response. The use of the word "ordinarily" recognizes that there may be circumstances where the need for rehearing is sufficiently clear to the court that no response is needed. But

before granting rehearing without requesting a response, the court should consider that a response might raise points relevant to whether rehearing is warranted or appropriate that could otherwise be overlooked. For example, a responding party may point out that an argument raised in a rehearing petition had been waived or forfeited, or it might point to other relevant aspects of the record that had not previously been brought specifically to the court's attention.

*Oral argument.* The amended Rule 40(d)(5) extends to rehearing en banc the existing prohibition (previously found in Rule 40(a)(2)) on oral argument on whether to grant a petition for panel rehearing.

**Subdivision (e).** The amendment clarifies the existing provisions empowering a court to act after granting a petition for panel rehearing (previously found in Rule 40(a)(4)), extending these provisions to rehearing en banc as well. The amended language alerts counsel that, if a petition is granted, the court might call for additional briefing or argument, or it might decide the case without additional briefing or argument. *Cf.* Supreme Court Rule 16.1 (advising counsel that an order disposing of a petition for certiorari “may be a summary disposition on the merits”).

**Subdivision (f).** The amendment adds a new provision concerning the authority of a panel to act while a petition for rehearing en banc is pending.

Sometimes, a panel may conclude that it can fix the problem identified in a petition for rehearing en banc by, for example, amending its decision. The amendment makes clear that the panel is free to do so, and that the filing of a petition for rehearing en banc does not limit the panel's authority.

A party, however, may not agree that the panel's action has fixed the problem, or a party may think that the panel has created a new problem. If the panel amends its decision while a petition for rehearing en banc is pending, the en banc petition remains pending until its disposition by the court, and the amended Rule 40(d)(1) specifies the time during which a new rehearing petition may be filed from the amended decision. In some cases, however, there may be reasons not to allow further delay. In such cases, the court might shorten the time for filing a new petition under the amended Rule 40(d)(1), or it might shorten the time for issuance of the mandate or might order the immediate issuance of the mandate under Rule 41. In addition, in some cases, it may be clear that any additional petition for panel rehearing would be futile and would serve only to delay the proceedings. In such cases, the court might use Rule 2 to suspend the ability to file a new petition for panel rehearing. Before doing so, however, the court ought to consider the difficulty of predicting what a party filing a new petition might say.

**Subdivision (g).** The amended Rule 40 largely preserves the existing requirements concerning the rarely invoked initial hearing en banc (previously found in Rule 35). The time for filing a petition for initial hearing en banc (previously found in Rule 35(c)) is shortened, for an appellant, to the time for filing its principal brief. The other requirements and voting protocols, which were identical as to hearing and rehearing en banc, are incorporated by reference. The amendment adds new language to remind parties that initial hearing en banc is not favored and ordinarily will not be ordered.

**Appendix:  
Length Limits Stated in the  
Federal Rules of Appellate Procedure**

This chart summarizes the length limits stated in the Federal Rules of Appellate Procedure. Please refer to the rules for precise requirements, and bear in mind the following:

- In computing these limits, you can exclude the items listed in Rule 32(f).
- If you use a word limit or a line limit (other than the word limit in Rule 28(j)), you must file the certificate required by Rule 32(g).
- For the limits in Rules 5, 21, 27, ~~35~~, and 40:

\* \* \* \* \*

	Rule	Document type	Word limit	Page limit	Line limit
--	------	---------------	------------	------------	------------

\* \* \* \* \*

<b>Rehearing and en banc filings</b>	<del>35(b)(2)</del> & <del>40(b)</del>  <u>40(d)(3)</u>	<ul style="list-style-type: none"> <li>• Petition for <u>initial</u> hearing en banc</li> <li>• Petition for panel rehearing; petition for rehearing en banc</li> <li>• <u>Response if requested by the court</u></li> </ul>	3,900	15	Not applicable
--------------------------------------	--	--	-------	----	----------------